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CHARLES ELMOR

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 25.

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. BARFORD, DECEASED,
PETITIONER,

v.

UNITED STATES OF AMERICA, AND COLONNA'S SHIPYARD, INCORPORATED,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

JACOB L. MOREWITZ,
L. B. COX,
D. ARTHUR KELSEY,
R. ARTHUR JETT,
Counsel for Petitioner.

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UNITED STATES OF AMERICA, AND COLONNA'S SHIPYARD, INCORPORATED,
RESPONDENTS.

BRIEF FOR PETITIONER.

I. *In Support of the Petitioner's Motion to Increase the Amount of Damages.*

The maximum amount of damages recoverable under the Virginia Statute is the sum of Ten Thousand ($10,000.00) Dollars, regardless of whether or not there be a showing of dependency. The Court in this case permitted a recovery on behalf of the administrator in the sum of only Five Thousand ($5,000.00) Dollars. It is manifestly an inadequate amount in view of the station,

age, experience and earning capacity of the decedent. He was forty-nine years of age, an officer of the ship and holding a license as such. It is true that at the time he met his death he was receiving wages of only One Hundred Twenty-five ($125.00) Dollars per month, but this was due largely to the fact that the crew of the vessel was engaged in preparing her for sea and as soon as her complement of officers had been made up he would have received higher wages.

Under the decisions of this Court, beginning with *The Ariadne,* 13 Wall. 475, and lately re-emphasized in *Standard Oil Company* v. *Southern Pacific Company,* 268 U. S. 146, we think this Court unquestionably may increase the amount of damages for the death of this decedent to a sum commensurate with the loss sustained by his heirs by reason of his death. In the recent case, decided by the District Court for the Southern District of New York, *In the Matter of the Petition of Clyde Steamship Company,* for limitation of liability, *The Inca,* 16 F. (2d) 930, *affirmed,* 18 F. (2d) 1015, *certiorari denied,* 275 U. S. 557, a recovery for the death of an officer of a ship in the sum of Twenty-five Thousand ($25,000.00) Dollars was allowed, and we submit that, in the case at bar, for this Court to increase the damages to the maximum amount of Ten Thousand ($10,000.00) Dollars, would be but a small recovery for the death of this decedent.

In the case of *The Munsey, Drowne* v. *Great Lakes Transit Corp.* (CCA 2nd) 5 F. (2d) 58, on the shipowner's appeal, in admiralty, a $13,500.00 death award was increased to $15,000.00, the full amount sued for. The Court of Appeals there held on this point:

> "We must take note of juries' awards of compensation as some guide to control us in the decision of this question of fact," citing *The Spokane,* (CCA2nd) 294 Fed. 242, *certiorari denied,* 264 U. S. 583, where a personal injury allowance was like-

wise increased from $8,000.00 to $15,000.00, and *The Ariadne, supra.*

II. *In Support of the Petitioner's Right to Maintain This Action.*

Counsel for petitioner had concluded that they would entirely rely upon the brief filed with their petition for a writ of *certiorari* in presenting this case to the Court, but since the writ was granted on February 25th, 1929, Mr. Chief Justice Taft, on April 8th, 1929, handed down the opinion of this Court in the case of *London Guarantee and Accident Company, Ltd.*, v. *Industrial Accident Commission of the State of California, et al.*, 279 U. S. 109, which we think is favorable to the petitioner's contention and we believe calls for a discussion more in detail of the first point made in the brief in support of the petition for a writ.

It was conceded by counsel for the United States in their argument of this case in the United States Circuit Court of Appeals, and also in their brief (p. 5) opposing the allowance of the writ herein, that the State Death Statutes applied in cases of personal injury resulting in death of seamen prior to legislation on the subject by Congress. [*Western Fuel Company* v. *Garcia*, 257 U. S. 233; *Great Lakes D. & D. Company* v. *Kierejewski*, 261 U. S. 479; *U. S. S. B. E. F. Corp.* v. *Greenwald*, (CCA 2nd) 16 F. (2d) 948]. Accordingly it is only necessary for us to discuss what effect, if any, Section 33 of the Merchant Marine Act of 1920, U S. C. Title 46, Sec. 688, may have had upon the old admiralty rules existing prior to the passage of that Act.

(1) *The History of Section 33.*

Section 33 was an amendment of Section 20 of the La Follette Seamen's Act of March 4, 1915. This Court, in discussing the constitutionality of this section in the

case of *Panama Railroad Company* v. *Johnson,* 264 U. S., 375, says at page 389:

> "As originally enacted Section 20 was part of an act, the declared purpose of which was 'to promote the welfare of American seamen'. It then provided that in suits to recover damages for personal injuries 'seamen having command shall not be held to be fellow servants with those under their authority' and in *Chelentis* v. *Luckenbach Steamship Company, supra,* this Court treated it as a part of the maritime laws, but held it did not disclose a purpose 'to impose on ship owners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore'. After that decisions the section was re-enacted in the amended form hereinbefore set forth as part of an act, the express object of which was 'to provide for the promotion and maintenance of the American merchant marine."

Compare with the above the cases of *O'Hara* v. *Luckenbach S. S. Company,* 269 U. S. 364, 367; *International Stevedoring Company* v. *Haverty,* 272 U. S. 50, 52; *Encarnacion* v. *Jamison,* (N. Y. St. Ct. Ap.,—July 11 1929), 1929 A. M. C., application for *certiorari* submitted to this Court on October 7, 1929, *sub-nom. Jamison* v. *Encarnacion,* No. 390 of the October Term, 1929.

We think, in the light of its judicial history, it can not be questioned that Section 33 was intended as an enlargement of the rights and remedies of seamen and not in limitation.

(2) *Construction of Section 33.*

In determining this question we find the decisions of the lower courts of little benefit, tending to confuse rather than to offer a clear determination of the question. Several of the New York State courts take the view that Section 33 supersedes all state death statutes involving seamen, and that suits to recover for injuries

resulting in death must be brought thereunder, while the federal courts in the *Kierejewski Case, supra,* in 280 Fed. 125; *The Samnanger* (1924), 298 Fed. 620, and *The Pioneer, Standard Oil Company of New Jersey* v. *Devries* (CCA 3rd), 3 F. (2d) 852, recognize the right of the seaman to sue under the old maritime rules on the ground that the vessel was unseaworthy and permit his personal representative to recover under the appropriate state death statute. On the other hand, the District Court for the Southern District of New York in the case of *Geislinger* v. *International Mercantile Marine Company* (1924), 295 Fed 176, held that Section 33 did not apply to suits in admiralty at all, relying upon the decision of *The Bouker* (CCA 2nd), 241 Fed. 831.

Under Section 33, the injured seaman, or in case of death, his personal representative, *may maintain* an action at law for damages with the right of trial by jury and in such action all statutes of the United States conferring or regulating the right of action for death in case of railway employees shall be applicable.

Turning to Section 1 of the Federal Employers' Liability Act of April 22nd, 1908, (Chapter 149, 35 Stat. 65, U. S C. Title 45, Sec. 51), it is seen that this section provides that the employer shall be liable in damages "for such injury or death resulting in whole or in part from the *negligence* of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its *negligence* in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

In order for there to be a recovery thereunder, there must be negligence on the part of the railroad company or on the part of some employee, *San Antonio etc. R. Co.* v. *Wagner,* 241 U. S. 476; *Southern Railway Co.* v. *Gray,* 241 U S. 333, and instructions to the jury in such cases which make the railroad company liable for defects, if such defects are not attributable to the negligence of the company or its servants, are erroneous, *Seaboard*

Air Line Railway Co. v. *Horton*, 233 U. S. 492 This negligence is further defined as such acts of commission or omission as by rule of common law be sufficient to entitle the case to be submitted to a jury. *Brundege* v. *Chicago B. & Q. R. Co.* (1926 Ill.), 154 N. E. 433.

It will be seen then that the right of action in such cases is based upon and springs entirely from the negligence of the railroad company, or its employees.

Turning to the decision of this Court in *The Osceola*, 189 U. S. 158, which is the leading case establishing the right of seamen to recover for the unseaworthiness of the vessel, we find this right of recovery to be defined at page 175 as follows:

> "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

And Mr. Justice Brown, in discussing this right of recovery, says:

> "It will be observed in these cases that a departure has been made from the Continental Codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the merchants' shipping act of 1876, above quoted (*Couch* v. *Steel*, 3 El. & Bl. 402; *Hedley* v. *Pinkney & Sons' S. S. Co.*, 7 Asp. M. L. Cas. 135 (1894) A. C. 222), and in this country, in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own."

It is apparent, then, that as a matter of contract, the

owner is required to furnish a seaworthy vessel just as much as he is required to furnish wages, maintenance and cure in the event a seaman is injured in the course of his employment, and if the seaman's injury was due to the unseaworthiness of the vessel he is entitled to recover compensation therefor.

Judge Neterer, in the case of *Lorang* v. *Alaska Steamship Company* (1924), 298 Fed., p. 547, in dealing with questions analogous to that before the Court, defines rights as the legal consequences which apply to certain facts, and remedies as the mode prescribed by law to enforce such a right. Accordingly, a seaman has two separate and distinct rights, first, the right to sue for personal injuries resulting in death caused by the negligence of his employer, either in the form of a negligent act of commission or an act of omission. The remedy provided by the section in question for such right is an action at law with a trial by jury, or else an *in personam* suit in admiralty. See *Panama Railroad Company* v. *Johnson, supra; Plamals* v. *The Pinar del Rio,* 277 U. S. 151. Second, the right to sue for personal injuries resulting in death caused by the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship. This Court has prescribed the remedy in such instances to be an *in personam* action against the owner, either at law or in admiralty, in which the right of recovery is fixed by the death statute of the state wherein death occurred, or a libel *in rem,* provided the death statute of such state allowed such an *in rem* action to be maintained. Compare *Western Fuel Company* v. *Garcia* and *Great Lakes D. & D. Company* v. *Kierejewski, supra; The Corsair,* 145 U. S. 335; *The Hamilton,* 207 U. S. 398; *The Anglo-Patagonian* (CCA 4th), 235 Fed. 92, *certiorari* denied 241 U. S. 636; *Lewis* v. *Jones* (CCA 4th), 27 F. (2d) 72, *certiorari* denied October 22nd, 1928, 73 L. Ed. (Adv. Op.) 83. We then have two distinct rights and two dis-

tinct remedies, which are governed by entirely different rules of liability, and pleading, and even of trial. They are alternate rights, with separate and distinct remedies

Counsel for the Government, in the argument of this case before the Circuit Court of Appeals, relied largely upon the decision of this Court in the case of *Baltimore Steamship Company* v. *Phillips*, 274 U. S. 316, which is not in any way decisive of the question now before the court. We think, on the other hand, it recognizes the two alternate rights as this Court there decided that where a seaman brings a suit in admiralty for injuries alleging the use of defective appliances and subsequently brings a suit at law under Section 33 of the Merchant Marine Act of 1920 for the same injuries alleging negligent operation of appliances by fellow servants, he can be entitled to but one recovery since there was but one actionable wrong. There can be but one actionable wrong in any case. If he pursues a remedy based upon a right which the facts do not support, he has had his day in court and he can not complain if he failed to pursue the remedy and right which the facts support. This Court, in the case cited nowhere says he could not select the right and remedy first pursued, but does say that having selected and pursued the alternate remedy given for such right, he is bound thereby.

(3) *Personal Representative of Deceased Seaman May Recover Under Old Rules.*

We consider the following recent decisions show that in its many opinions determining the applicability of the Industrial Compensation Statutes to admiralty causes of action, this Court recognizes an exception in the case of seamen who bring their actions by libels *in personam* or *in rem*, on the ground of unseaworthiness as established by the old maritime rules, and permits them to recover under the appropriate state death statutes. Mr. Chief

Justice Taft, in the case of *London Guarantee & Accident Company, Ltd.*, v. *The Industrial Accident Commission of the State of California, et al., supra,* discusses the line of decisions in which this Court has refused to permit state Industrial Compensation Acts to encroach upon the admiralty jurisdiction, and says, page 119:

> "Another class of cases is illustrated by *Western Fuel Company* v. *Garcia,* 257 U. S. 233. There a stevedore was killed while at work in the hold of a vessel under charter to the fuel company. The Workmen's Compensation Commission granted an award to the widow and children. This was annulled by the state court and then the widow and children brought a suit in admiralty against the fuel company in the District Court of the United States alleging death by negligence and prayed for damages The District Court was held to have jurisdiction in admiralty under *La Bourgogne,* 210 U. S. 95; *American Steamboat Company* v. *Chase,* 16 Wall. 531; *The Hamilton,* 207 U. S. 398. The plaintiff was defeated in the admiralty suit by application of the state statute of limitations. The court thus recognized a well established exception to the non-application of state statutes to admiralty jurisdiction, which is when they give a common law remedy for death by wrongful act. But this court in the *Knickerbock Ice Company case* decided that it could not extend the saving clause of Section 256 to include an award under the state workmen's compensation act. Such cases as the *Garcia case, supra; Northern Coal & Dock Company* v. *Strand,* 278 U. S. 142, and *Great Lakes Dock Company* v. *Kierejewski,* 261 U. S. 479, are therefore hardly to be regarded as real exceptions to the exclusive jurisdiction of admiralty by Section 356."

Northern Coal & Dock Company v. *Strand, supra,* it should be noted, was the chief reliance of counsel for the Government in their brief (pp. 5-6) opposing the issuance of a *certiorari* herein.

In the case of *Western Fuel Company* v. *Garcia, supra,* the action was an admiralty suit *in personam,* and the court there held at page 242:

> "As the logical result of prior decisions we think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given."

The opinion in this case was handed down by Mr. Justice McReynolds on December 5th, 1921, nearly eighteen months after the passage of the act The High Seas Death Act, approved March 30th, 1920, 41 Stat. 537 (U. S. C. Title 46, Sec. 761), is referred to by the court as not covering the cause of action, and it is to be presumed that if the court considered Section 33 as in any way infringing upon the right of the plaintiff to maintain his action, some reference would have been made to it, although the plaintiff was a stevedore and not a seaman. We think the decision of this court *In Re*: East River Towing Company, Inc.—*The Edward*—266 U. S. 355, also recognizes an exception of petitioner's case. Mr Justice Holmes, in delivering the opinion, and after recognizing the growing considerations for the claims of labor and the suggestion that enlistment of seamen needs to be encouraged equally with the building of ships, and in answering the question of whether or not this section has impliedly repealed the statute regarding the limitation of liability of ship owners so far as claims or suits based on personal injuries to or death of seamen are concerned, says at page 368:

> "The wholesale adoption of the law for railroads above mentioned must be taken as an adoption of principles not as a basis for meticulous discovery

of conflict with an established system in matters of detail. The choice of a jury trial is given when things take their ordinary course, not to break in upon the settled mode of adjustment when the ship is given up."

III. *Conclusion.*

As above stated, this brief is supplementary to the brief accompanying the petition for a writ of certiorari and is made necessary, we think, by the recent decision of this Court above referred to. The brief submitted with the petition for writ is relied upon in support of all of the points there made.

We respectfully submit that the petitioner has the right to maintain his action in the form he has pursued; that the judgment of the United States District Court for the Eastern District of Virginia, allowing him a recovery on the ground of unseaworthiness was clearly right, but that the amount of damages allowed by the District Court was inadequate; that the judgment of the United States Circuit Court of Appeals for the Fourth Circuit should be reversed, and that this Court should enter judgment for the petitioner for damages in the sum of at least Ten Thousand ($10,000.00) Dollars.

Respectfully,

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